

Training Manual for State Environmental Code 1995
Chapter 6
Understanding the Enforcement of Title 5

Summary of Key Enforcement and Variance Provisions

15.022: Duty of Compliance is on the owner(s) and operator(s) jointly and severally of a facility served by a system.

15.023: Approving Authority Access Board of Health or DEP may examine systems at any reasonable time to determine compliance – if access is denied, a warrant may be sought 1 – filing of an application for Disposal Construction Permit (DSCP) or any other approval under Code constitutes applicant's consent for entry at reasonable times for purposes associated with approval.

15.024 Violations of 310 CMR 15.000 for any person to:

1. Construct and use system not in compliance with DSCP, Certificate of Compliance, other approval or order;
2. Use, modify, or alter a facility to increase design flows above approved capacity without the approval of Board of Health and DEP; or
3. Aggregate facilities or divide a facility into separate facilities without having an inspection and obtaining a certificate of compliance – if the Board of Health or DEP determines that the ownership of facilities asserted to be in separate ownership of facilities asserted to be in separate ownership was arranged to circumvent the requirement:
 - a. To install a recirculating sand filter or equivalent technology for systems of 2,000 gpd or greater located in nitrogen sensitive areas (Interim Wellhead Protection Areas or mapped Zone IIs) pursuant to 310 CMR 15.202; or
 - b. To obtain a groundwater discharge permit for systems of 10,000 gpd or greater pursuant to 314 CMR 5.000, the Board of Health and/or DEP may order such action.
4. Construct, upgrade, or expand a system without the prior approval of the Board of Health or the Department in the form of a Disposal System Construction Permit (DSCP) or approval of an emergency repair²;
5. Fail to take any necessary corrective actions as directed by the Board of Health or DEP;
6. Fail to obtain an inspection when and as required;
7. Violate any other provision of Title 5 or applicable local requirements.

15.025: Enforcement by Approving Authorities

Pursuant to M.G.L. c 21A §13, Boards of Health may enforce the provisions of 310 CMR 15.000 in the same manner in which local health rules and regulations are enforced. Whenever a board of health fails to enforce within a reasonable period of time, the Department may act to effect compliance with 310 CMR 15.000 under applicable provisions of M.G.L. c 21A, §§ 27 through 53; M.G.L. c 21A, §§ 13 and 16 and any other applicable law.

Notice of Noncompliance.

The Board of Health or DEP may choose to document the noncompliance of an owner or operator of a system through the issuance of a letter of noncompliance which requests the recipient to perform actions necessary to come into compliance with 310 CMR 15.000. Such letter is not an order and is not appealable pursuant to 310 CMR 15.420 through 15.422.

15.026 Orders

The Board of Health or DEP may issue orders requiring the owner or operator of a facility to come into compliance with the provisions of 310 CMR 15.000 or to take any other action necessary to protect public health, safety, welfare or the environment. Each day's failure to comply with the order within the timeframe specified shall constitute a separate offense and may result in penalties.

Service of Orders

- a. Personally, by any person authorized to serve civil process, or
- b. By any person authorized to serve civil process by leaving a copy of the order at his/her last and usual place of abode, or
- c. By sending him/her a copy of the order by registered or certified mail, return receipt requested, if his/her last and usual place of abode can be determined based on a review of the local tax assessor's records, or
- d. If his/her last and usual place of abode is unknown, by posting a copy of the order in a conspicuous place on or about the facility and by advertising it for at least three out of five consecutive days in one or more newspapers of general circulation within the municipality wherein the affected facility is situated.

Emergency Order

Whenever an imminent threat to public health, safety, welfare or the environment exists, or could result during the pendency of a hearing on the order, the local approving authority or the Department may issue the order reciting the existence of the emergency and requiring that such action be taken.

15.421: Appeals From Determinations by Board of Health

Any person aggrieved by any order, variance, issuance or denial of a Disposal System Construction Permit, Local Upgrade Approval or Certificate of Compliance issued by the board of health may appeal to any court of competent jurisdiction. Pursuant to M.G.L. c 21A §13, Superior Court has jurisdiction to enforce the provisions of this code.

15.422: Appeals of Departmental Determinations

An applicant who is aggrieved by a variance determination order, or by a commonality determination that facilities asserted to be in separate ownership or control should be treated as a single facility (310 CMR 15.011) by the Department may request an adjudicatory hearing on that determination in accordance with 310 CMR 1.00 and M.G.L. c. 30A.

15.410: Variances - Standard of Review

Boards of health and the Department may vary the application of any provisions of 310 CMR 15.000 with respect to any particular case except those listed in 310 CMR 15.415:

- a. New construction – 4 feet of naturally occurring pervious material;
- b. Upgrades or increases in flow to existing system – 4 feet of naturally occurring pervious material unless:
 - i. applicant demonstrates that other alternatives are not feasible and connection to shared system or sewer is not feasible,
 - ii. at least 2 feet of naturally occurring pervious material is maintained,
 - iii. deep hole test documents that 4 feet standard cannot be met anywhere on site,
 - iv. evidence that easement on adjacent property cannot be obtained that meets 4 foot requirement,
 - v. sufficient evidence that documents high ground water elevation per procedure in 310 CMR 15.103.

Variances shall be granted subject to such conditions as necessary to protect public health, safety and the environment (310 CMR 15.413) only when, in the opinion of the approving authority:

- a. The applicant demonstrates manifest injustice; and
- b. The applicant proves an equivalent degree of environmental protection without strict application of 310 CMR 15.000.

New construction – manifest injustice includes demonstration that strict enforcement of 310 CMR 15.000 deprives the applicant of substantially all beneficial use of the subject property.

15.411: Variance Process

1. Every request for a variance must be in writing and identify the specific provision of 310 CMR 15.000 for which a variance is sought and include a statement demonstrating manifest injustice and proving equal degree of environmental protection. No application for a variance shall be complete until the applicant has notified all abutters by certified mail at his/her own expense at least ten days before the Board of Health meeting.

2. Emergency repairs (310 CMR 15.353) may be performed without seeking a variance. The owner of the system must seek a variance within 30 calendar days after

performing the emergency repairs.

3. Approvals and denials of variances must be in writing. Denials must contain a brief statement of the reasons for the denial and may require the applicant to upgrade the system in accordance with standards and requirements at 310 CMR 15.404 and 15.405.. A copy of each variance shall be conspicuously posted for 30 days following its issuance; and shall be available to the public at all reasonable hours.

4. A request for a variance for a residential facility with four units or less (as described in M.G.L. c. 111, § 31E) are constructively approved by the board of health if not acted upon within 45 days of receipt of a complete application. Such variances are still subject to review by the Department in accordance with 310 CMR 15.412.

15.412: Review of Variances by the Department

1. All variances other than those listed below in (2) must be submitted for DEP review with copy of approved board of health variance. DEP has 30 days to act from receipt of a complete application. DEP's failure to act results in constructive approval of the variance.

2. No DEP review of the following variances required where the board of health has approved the variance.

- a. Reduction of property line setbacks (310 CMR 15.211), provided that a survey of the property line shall be required if a system component placed within five feet of the property line, and maintain a 10 foot separation between abutting soil absorption systems;
- b. Reductions of system location setbacks from cellar wall, swimming pool, or slab foundations (310 CMR 15.211).
- c. Reduction of 400 foot setback to surface water supplies to no less than 200 feet, reduction of 200 foot setback to tributaries to surface water supplies to no less than 100 feet, retention of no less than 50 feet of soil absorption system to surface waters, and retention of no less than 25 feet of septic tank to surface waters in watersheds other than Worcester, Quabbin and Wachusett (to which MDC watershed protection regulations, 310 CMR 11.00 apply) provided that board of health specifically finds, after consultation with water suppliers, that owing to circumstances relating to soil conditions, slope or topography of land, relief may be granted without substantial detriment to public good and without impairing quality of water in watersheds.

15.414: Variances for Increased Flow to Existing System

The general rule is that no increase in flow to existing systems is allowed unless system is upgraded in full compliance with new construction requirements unless a variance is obtained (310 CMR 15.352). To obtain a variance, the applicant must:

1. Demonstrate manifest injustice considering all relevant facts and circumstances of the case including:

- a. The applicants shall be deemed to have had knowledge of 310 CMR 15.352 requirements;

- b. The costs of full compliance with the requirements applicable to new construction shall be compared to the costs of compliance with a variance; and
 - c. Whether an upgrade in full compliance with 310 CMR 15.000 is feasible without increased flow.
- 2. Demonstrate that the system cannot be brought into full compliance through any of the following:
 - a. An upgraded system, which is in full compliance with the code;
 - b. An alternative system;
 - c. A shared system;
 - d.. Connection to a sewer system.
- 3 Demonstrate that the upgraded system with the increased flow provides better protection of public health and safety and the environment than the existing system with no increase in flow.

15.416: Variances for Schools

- 1. A school means any public or privately owned elementary, middle, or secondary school. University, college or other adult educational facilities, regardless of ownership, are not considered schools for these purposes.
- 2. Required demonstrations
 - a. The variance is necessary to accommodate an overriding community, regional, state or national public interest; and
 - b. A level of environmental protection without strict application of 310 CMR 15.000 is obtained.
- 3. Additional demonstrations for flow variances:
 - a. Use of metered maximum daily water flow readings from comparable facilities are or will be substantially different from those contained in flow charts at 310 CMR 15. 203 (5) because of water conservation techniques or other factors, including consideration of occupancy and use rates;
 - b. System design has accounted for any anticipated pollutant loadings and greater concentration of pollutants that result from reducing flows; and
 - c. Design flows with approved variances must be based on 200% of the average daily water meter readings when school is in session.
- 4. A groundwater discharge permit will be required if any school with a design flow of 10,000 gpd or greater but less than 15,000 gpd is located within 400 feet of a surface water supply, within 200 feet of tributary to surface water supply or is located within an Interim Wellhead Protection Area or mapped Zone II unless DEP has determined, after consideration of the factors at 310 15.304 (3) that this requirement is manifestly unjust and the owner or operator of the school has established that a level of environmental protection that is at least equivalent can be achieved without strict application of 310 CMR 15.000.
- 5. The Department may vary the prohibition on increased flows to systems with design flows between 10,000 and 15,000 gpd set forth in 310 CMR 15.0006 (4) where the applicant:

- a. Satisfies the criteria of 310 CMR 15.416(2)
- b. Demonstrates that there are no reasonable conditions or alternatives that would allow the system to be expanded in compliance with the provisions of 310 CMR 15.000 or other applicable requirements; and
- c. Demonstrates that the upgraded system with the increased flow provides better protection of public health and safety and the environment than the existing system with no increase in flow.

15.417: Variances from Percolation Rate

1. To assist in determining the advisability of allowing perc rates between 30 and 60 minutes per inch, DEP may permit the construction of systems for up to 20 single family dwellings per year.

2. Process Approval

- a. RFP to be issued by DEP with procedures to obtain approvals;
- b. Completed applications must include board of health support letter and proposed monitoring plan;
- c. DEP approval shall require annual inspection for at least seven years, written notice to any purchaser of dwelling, and receipt of Disposal Construction Permit form Board of Health, and
- d. No approvals within nitrogen sensitive areas (e.g. Interim Wellhead Protection Areas, mapped Zone IIs).

Lowering the Threshold from 15,000 GPD to 10,000 GPD Groundwater Discharge Permit Required for Systems >10,000 GPD – 314 CMR 5.00 Revisions

As required by M.G.L. c.21 § 27, the Bureau of Resource Protection (BRP) of the Department of Environmental Protection has established a program for the regulation of discharges of pollutants to the ground waters of the Commonwealth 314 CMR 5.00. Activities that are exempt from the need to obtain a groundwater discharge permit are listed in 314 CMR 5.05. In connection with the new Title 5, 310 CMR 15.000, promulgated on September 23, 1994, BRP will be holding public hearings prior to March 31, 1995 regarding replacing current language in 314 CMR 5.05 (1) which exempts facilities of 15,000 gallons per day or less with the following language which will exempt the following facilities:

- 1.
 - a. Any facility which discharges a liquid effluent as a result of the treatment of sewage at a treatment works which is designed to receive and receives 15,000 gpd or less provided that facility and treatment works were designed, approved, constructed and maintained in accordance with 310 CMR 15.00, "The State Environmental Code, Title 5, Minimum Requirements for the Subsurface Disposal of Sanitary Sewage" (the 1978 Code, as in effect until March 31, 1995), or in accordance with Article 11 of "The State Sanitary Code Minimum Standards for Sanitary Sewage" (the predecessor to the 1978 code), as in effect, and the facility and treatment works are maintained, including, but not limited to, upgraded, if required, in accordance with 310 CMR 15.000, "The State Environmental Code, Title 5, Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-site Sewage Treatment and Disposal Systems and for the

Transport and Disposal of Septage” (promulgated on September 23, 1994, and as in effect).

b. Any facility which discharges a liquid effluent as a result of the treatment of sewage at a treatment works which is designed to receive and receives 10,000 to 15,000 gpd of sewage, which, pursuant to 310 CMR 15.004 (2) (b), 310 CMR 15.005 (7) or 310 CMR 15.006 may be approved, constructed and/or maintained, after March 31, 1995; provided that such facility and treatment works are designed, approved, constructed and maintained, including, but not limited to, upgraded, if required, in accordance with 310 CMR 15.000.

c. Any facility which discharges a liquid effluent as a result of the treatment of sewage at a treatment works which is designed to receive and receives less than 10,000 gpd, provided that such facility and treatment works are designed, approved, constructed and maintained, including, but not limited to, upgraded, if required, in accordance with 310 CMR 15.000.

In addition, 310 CMR 15.020 provides, in part, that a Disposal System Construction permit “shall not authorize increased design flow which would bring the total design flow to 10,000gpd or greater but less than 15,000 gpd” except for subdivisions entitled to M.G.L. c111, §127P protection, M.G.L. c.40B comprehensive permit land, and large systems with approved plans and disposal system construction permits issued by March 31, 1995 all as set forth in 310 CMR 15.005 (transition rules) or pursuant to a variance issued by the Department in accordance with 310 CMR 15.414.

In light of the proposed revisions to 314 CMR 5.05 (1) and 310 CMR 15.020, when an application for a disposal system construction permit is submitted to a Board of Health, the Board must make a determination as to whether the volume of sewage to be disposed of on the lot is in excess of 10,000gpd. 310 CMR 15.203 contains a table of sewage flow estimates and specifics, for example, that the daily sewage flow for single and multiple dwelling units is 100 gpd per bedroom.

Applicability of Title 5 or 314 CMR 5.00 to Condominiums

When an application for a disposal system construction permit is made for a new condominium development, the Board of Health should calculate the daily volume of sewage flow by multiplying the number of bedrooms in the entire development by 110. To ascertain the number of bedrooms in an entire development, the Board of Health must determine the maximum number of bedrooms allowed under the master deed(s) for all of the phases of the development. If the master deed(s) allows for more than one phase of development, which is often the case, the Board of Health’s calculation of the number of bedrooms in the development should not be based on the number of bedrooms of the particular phase for which the permit application has been made, but instead should be based on the total number of bedrooms allowed under all of the phases, i.e., under the entire development.

In addition to providing sewage flows for bedrooms, Title 5, 310 CMR 15.203, gives sewage flows for swimming pools, laundromats, restaurants, tennis clubs, etc. The allowance for any of these facilities in a master deed, depending upon the type of the particular facility, could increase the total, daily volume of sewage flow for the development. If it is not clear from the master deed that the particular facility would

increase the sewage flow, the Board of Health should contact the appropriate DEP regional office for assistance in making this determination.

If a board of health concludes that the total, daily sewerage flow for a development would exceed 10,000 gpd, the board should not issue the applicant a disposal classification construction permit. In such cases, the board should advise the applicant to submit to the Department a copy of the master deed(s), plans for a treatment facility and a discharge permit application.

Expansion of Existing Developments

Proposed expansion beyond the number of units having approval, but resulting in a total sewage flow, for the lot, of less than 10,000 gpd, is to be reviewed by the DEP and Boards of Health in accordance with Title 5 criteria.

Expansion that would result in a total, daily sewage flow exceeding 10,000 gallons for an entire lot or development would require DEP's approval and would be subject to the provisions of 314 CMR 5.00.

Notes

1. A member of the Board of Health or a health agent may apply for a search warrant and conduct the search. Be prepared to document the reasons why you suspect a violation is occurring or has occurred on the site, the measures you have taken to gain compliance, and the seriousness of the alleged violation. In order to obtain a civil administrative search warrant, go to the civil, not the criminal clerk's office of the local Superior Court. Make sure the clerk understands you are seeking a civil – not a criminal – search warrant. If you are concerned about your personal safety during a site inspection, you may wish to contact your local police department so that they can accompany you during your inspection. It is recommended that Boards of Health consult with Town Counsel to assure that proper legal procedures are followed.
2. Emergency repairs are covered by 310 CMR 15.353, must be completed within 30 days, and are limited to the following:
 - a. Pumping as frequently as necessary to prevent backup;
 - b. Repair or replacement of structural components of system otherwise in compliance with Code (e.g. clogged building sewer or distribution line, damaged building sewer, septic tank or distribution box or broken tee) which is determined to be cause of system failure and for which no modification of system design is required.
3. Increased flows not in compliance with 310 CMR 15.000 will rarely provide better protection than existing flows to a system designed and constructed in compliance with the 1978 Code or 310 CMR 15.000, but are more likely to constitute improvements over nonconforming or failed systems.